No. 82-2110

In The
Supreme Court of the United States
1982-83 Term

ODIS BEST,

Petitioner-Plaintiff,

vs.

RALPH P. EAGERTON, JR., and JAMES C. WHITE, as COMMISSIONER OF REVENUE FOR THE STATE OF ALABAMA,

Respondent-Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

Respondent-Defendants.
RICHARD B. GARRETT

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COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

Respondents submit that this case is not a proper case for certiorari, and would respectfully re-phrase the questions presented for review as follows:

(1) Should certiorari be granted to review the opinion of a Court of Appeals upholding a District Court in its "exercise [of] its limited discretion to determine the propriety of equitable relief based on the facts as found by the jury" [*Williams v. City of Valdosta*, 689 F. 2d 964 (11th Cir. 1982)] where the District Court declined to award equitable relief based upon the facts heard by the Court and the jury and upon which the jury returned a verdict in favor of all defendants?

(2) Should certiorari be granted to review the opinion of a Court of Appeals which dealt with various procedural due process issues, where there is controlling precedent from this Court as to all such issues and no *material* split among the circuits as to such issues?

(3) Should this Court grant certiorari to review the opinion of a Court of Appeals, upholding a decision by the District Court, that Plaintiff was not entitled to attorney's fees under 42 U. S. C. § 1988 since he was not "the prevailing party", where the procedural due process claims on which Plaintiff prevailed were found by both the Court of Appeals and the District Court to be a minimal part of the Plaintiff's lawsuit, where such claims accrued after the suit had been filed, were added by amendment and were resolved by partial summary judgment, and where after a lengthy trial, the jury returned verdicts in favor of all defendants and Plaintiff was denied his "central issue" claims for relief of reinstatement and money damages?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

ODIS BEST	—APPELLANT/CROSS-APPELLEE
RALPH P. EAGERTON, JR.	—APPELLEE/CROSS-APPELLANT

AND

JAMES C. WHITE	—WHO SUCCEEDED RALPH P. EAGERTON, JR., AS COMMISSIONER OF REVENUE

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REFERENCE TO REPORT OF OPINIONS

The opinions of the United States Court of Appeals for the Eleventh Circuit and of the District Court are cited in Petitioner's brief and copies of the pertinent opinions are included in the appendix to Petitioner's brief.

JURISDICTIONAL GROUNDS

Although Respondents submit that this is not a proper case for the granting of certiorari, they do not contest

Petitioner's statements as to the timeliness of the filing of various petitions or the jurisdictional basis posited.

STATEMENT OF THE CASE

Respondents adopt as a statement of facts and of the case the factual background set out in the opinion of the United States Court of Appeals for the Eleventh Circuit, dated January 31, 1983:

"By 1974, Odis Best had fifteen years experience as a Revenue Examiner for the state of Alabama, and was auditing the corporate and personal income tax returns of Elsie Estes, a widow without business acumen whose husband had been in the pulpwood business. Because of Best's actions, a tax lien was filed. In 1976, the lien remained unsatisfied and Best requested that a second execution of lien be prepared. That May, Best purchased one hundred acres of Estes' land for approximately $7,000.00. Best then executed a deed to twenty acres to Mrs. Lee G. Stephens for $9,000.00, two thousand dollars more than Best had paid for the entire parcel of which he still owned eighty percent. By November, Estes filed suit against Best alleging that Best had deceived her in effecting the purchase of the real property.

"Mrs. Stephens, the purchaser of the twenty acres, became alarmed. On February 3, 1977, as a result of their attorneys' negotiations, Best paid Stephens $10,000.00 and Stephens executed a quitclaim deed to the twenty acres. The lawsuit between Estes and Best was resolved by settlement during 1978.

"As a result of what has been termed the 'Estes matter', Best was demoted by then Revenue Commissioner

Boswell from his supervisory position. Eagerton assumed the office of Revenue Commissioner on January 15, 1979. There is some disagreement as to Eagerton's statements regarding reinstatement of Best to a supervisory position. Best was not reinstated and instituted the present action, which did not name Eagerton or the Department of Revenue as a defendant.[1] In December, 1979, Eagerton learned that, despite an agreement with Best and his attorney to the contrary, Eagerton was going to be added as a defendant in the suit. At this time, Eagerton reviewed Best's income tax returns and discovered that the Estes-Stephens land transactions had not been reported. Correspondence between Eagerton and Best ensued. A meeting also occurred between the two men in which Eagerton told Best that if Best did not adhere to this agreement, not to name Eagerton as a defendant, Eagerton would fire him. Best's returns were assigned to an auditor with instructions to keep the audit confidential.

"The auditor and Best communicated both by mail and in person. The auditor, Johnson, reported that Best was not furnishing requested information and that Best was using his expertise in Alabama tax law to thrwart the audit. On the basis of this information, and without a hearing Eagerton suspended Best from his position for two weeks. The propriety of this suspension is the subject of the cross-appeal.

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[1]The initial complaint, filed June 12, 1979, named as defendants Boswell, Atkins, (Director of the Field Division of the Alabama Department of Revenue) and Bradshaw (Director of the Income Tax Division of the Alabama Department of Revenue). Defendant Atkins was subsequently dismissed with the consent of all parties. R. 463. Boswell and Bradshaw remained defendants in the several amendments to the complaint, however, the jury decided the issues in favor of these defendants and the demotion issue is not raised on appeal.

"While Best was suspended, the Department of Revenue issued a subpoena for records and such records were examined. Additional records were requested and Best's attorney agreed to produce these records at a later date. In the interim, however, the auditors presented their results on Best's audit to Eagerton and Revenue Department attorneys. The attorneys advised Eagerton that sufficient grounds existed to dismiss Best from employment. On July 16, 1980, Eagerton drafted the dismissal letter,[2] which Best received the next day.[3]

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[2]'The letter stated:

'Dear Mr. Best:

'You have worked in this Department for over eighteen years. Fifteen of those years as a Revenue Examiner conducting income tax audits and three years supervising examiners performing income tax audits.

'I have always assumed that with this experience, you had a good understanding of the Alabama statutes as they relate to income tax.

'The results of an audit of your and your wife's income tax reports for the calendar years 1976, 1977 and 1978 gives me reason to believe that you have filed false or fraudulent returns for those years as to the following:

'1. You have received money from the sale of a parcel of land which was not reported.

'2. You sold personal assets which were not reported.

'3. You failed to furnish records to substantiate certain deductions claimed.

'4. You have failed to give your whole-hearted cooperation during the conduct of this audit as befits an employee of the Department of Revenue, in my opinion.

'In view of the above, I have no alternative but to dismiss you from State service as of 5:00 o'clock P.M., July 16, 1980.

'If you would like a hearing on these charges, I will arrange one for you for 2:00 P.M., July 23, 1980.

'Please inform me of your wishes in this regard.

'Very truly yours,

'Commissioner of Revenue'

[3]'Because the letter was not delivered to Best until the following day, the effective date of dismissal was amended to 5:00 P.M., July 17, 1980.'

"Best's attorney requested that the reasons for dismissal be delienated with greater specificity, and Eagerton complied by sending a letter as follows:

'Dear Mr. Best:

Pursuant to the request of your attorney, Alvin Prestwood for an intemization in detail of the reasons for your dismissal from the employment of the State of Alabama, Department of Revenue, the following constitute the specifics of the charges contained in your letter of dismissal dated July 16, 1980 and July 17, 1980, in which you were advised of my reasons to believe that you have filed false or fraudulent returns for the calendar years 1976, 1977 and 1978.

'CHARGE 1: You received money from the sale of a parcel of land which was not reported.

'Sale of 20 acres of land purchased from Mrs. Elsie B. Estes and located in Autauga County, Alabama, in August 1976 for the sum of $9,000.00, resulting in a taxable gain which was not reported in your 1976 Alabama income tax return.

'CHARGE 2: You sold personal assets which were not reported.

'A. 1976 Rambler Ambassador 4-Dr. Sedan—the income from which was not reported for 1976.

'B. 1970 Plymouth Fury 4-Dr. Sedan—the income from which was not reported for 1977.

'C. 1972 Dodge—the income from which was not reported for 1977.

'D. 1973 Ford—the income from which was not reported for 1977.

'E. 1974 Ford Galaxie 4-Dr. Sedan—the income from which was not reported for 1978.

'F. Boat—the income from which was not reported for 1977.

'CHARGE 3. You failed to furnish records to substantiate certain deductions claimed.

'In conjunction with an official investigation of your state income tax return for calendar year 1976, you were requested by me to furnish documentation to support your claim for deduction for contributions, interest expense, casualty loss and your claim of a dependent exemption for M. D. Best. In lieu thereof, you tendered to me a check in the amount of $117.24 for additional taxes owed. As of this date, you have failed to provide such substantiation as to contributions and the dependent claimed.

'CHARGE 4: You failed to give your whole-hearted cooperation.

'You failed to produce the documents and information referred to in #3 above. In addition, you have repeatedly failed to furnish documents and information to revenue examiners, David Johnson and James R. Hodges requested by them in order to complete their audit. On more than one occasion you have broken appointments with these examiners and have walked out during meetings with these examiners. On more than one occasion you have told these examiners that you would not comply with their requests for information and documents unless such requests were put in writing. You also failed to furnish information and

documentation upon the repeated requests of these examiners in conjunction with the purchase and sale of land set out in paragraph 1 above and in conjunction with the purchase and sale of the personal property set out in paragraph 2 above.

'As your attorney was apprised in court on July 18, this is to inform you that due to my being a party in the case of Best v. Boswell, I consider that it would be in your best interest and would insure a fair and impartial hearing for me to name a designee to conduct the hearing now set for August 8, at 2:00 P.M. I plan to name such a designee unless you have objections to my doing so. If you do, please communicate any objections and the reasons therefor, to me prior to the scheduled hearing.

'/s/ Ralph Eagerton'

Best declined to have a designee named and was there after afforded a hearing before Commissioner Eagerton on August 11, 1980. Eagerton affirmed the termination.[4]

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[4]'Dear Mr. Best:

'Pursuant to the policies of this department and upon the request of your attorney, Mr. Alvin Prestwood, an administrative hearing was held at 2:00 P.M., on August 11, 1980, concerning certain charges of which you had previously been notified. At such hearing, you were afforded an opportunity to present any evidence, testimony, documents, call any witnesses and present any argument that you or your attorney might choose to present. Also at your request, made through Mr. Prestwood, I acted as the hearing officer at such hearing. After having carefully weighed and considered all of the evidence and arguments presented at the hearing on August 11, 1980, it is my opinion that based upon the evidence presented to me, there is ample reason to believe that each of the charges against you are true and correct and that your termination from state employment should be upheld. Accordingly, I hereby so hold and affirm the termination, of which you have previously been notified.

'/s/ Ralph Eagerton'

Best had previously notified the State Personnel Board that he wished to appeal. The State Personnel Board held a hearing on February 18, 1981 lasting over thirteen hours at which both sides were represented by counsel, called witnesses, cross-examined witnesses and introduced evidence. The Board sustained Best's dismissal and Best did not appeal.

"In federal district court, Best pursued his Section 1983 action, amending the complaint several times. The district judge granted Best's motion for partial summary judgment and held that a merit system employee may not be suspended without some kind of notice and some kind of hearing and that Alabama Code Section 36-26-28 is unconstitutional insofar as it permits suspensions without a prior hearing. The district judge therefore entered judgment in Best's favor for back pay during the period of Best's suspension (May 30, 1980 through June 13, 1980) and Eagerton cross-appeals the entry of this judgment.

"The cause proceeded to jury trial and the jury found in favor of all defendants and judgment was entered accordingly. The district court denied Best's motion for new trial, or alternatively to award injunctive relief in the form of reinstatement with full back pay as well as Best's motion for attorney's fees. *Best v. Boswell,* 516 F. Supp. 1063 (M. D. Ala. 1981). Best timely filed a notice of appeal and raises the following issues for our consideration: whether the district court should have granted Best a new trial on the ground that the jury verdict was contrary to the great weight of the evidence; whether the district court should have awarded Best equitable relief; whether the post termination hearing was sufficient to cure any pretermination deficiencies regarding Best's dismissal; and whether Best

is entitled to an award of attorneys' fees. Eagerton cross-appealed on the issue of the constitutionality of Alabama Code Section 36-26-28 (1975)." [696 F. 2d at 1284-87].

REASONS FOR DENYING THE PETITION

1. Petitioner is not entitled to review by certiorari since the district court, after hearing the same evidence on which the jury returned a verdict for all defendants, exercised its discretion to deny equitable relief.

The federal courts are authorized under *Beacon Theaters, Inc. v. Westover,* 359 U. S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959) and Rules 1, 2 and 18 of the Federal Rules of Civil Procedure to try both legal and equitable causes in the same action. In the case presently before the court, Petitioner asserts that by allowing the jury verdict to control the equitable issues of the case, Petitioner was caused irreparable harm and as such, he is entitled to have his equitable claim decided by a court independent of the jury verdict (Petitioner's brief 17, 18 and 19).

Under the facts of this case, Petitioner should not be heard to complain. Indeed, Petitioner and all other parties involved in the lawsuit agreed that the issue of equitable relief would be decided after the jury reached its verdict on the legal issues in the case. In sanctioning this type of proceeding, the court in *Beacon Theaters* held:

> "If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable

> harm while affording a jury trial of the legal issues, the trial court will necessarily have to use its discretion in deciding whether the legal or the equitable issue should be tried first. [359 U. S. at 991.]

3 L. Ed. 2d 988.

It should be noted that the decision in *Beacon Theaters* speaks to the preservation of a jury trial on legal issues. That is, the concern of the Court rests with the risk of losing the constitutional right to trial by jury through the prior determination of equitable issues. Petitioner's attempt to construe *Beacon Theaters* to provide constitutional protections to a judge's determination of equitable issues is incorrect. Indeed, the very language of *Beacon Theaters* is to the effect that the judge should use his discretion in determining whether legal or equitable issues should be tried first. This is consistent with the Eleventh Circuit case of *Williams v. City of Valdosta,* 689 F. 2d 964, 977 (11th Cir. 1982) relied on by the panel, in which the court states, "the role of the trial court is to exercise its limited discretion to determine the propriety of equitable relief based on the facts as found by the jury."

Petitioner would assert that the holding of *Jungman v. St. Regis Paper Company,* 682 F. 2d 195 (8th Cir. 1982) presents a conflict with the *Williams* decision decided in the Eleventh Circuit. This assertion of conflict presumably rests on the statement by the *Jungman* court that:

> "Even if the jury had decided the identical question, the statute of frauds question was reserved for the court and the court was entitled to make necessary findings independent of a jury. The jury's authority is considered advisory authority."

682 F. 2d at 197.

It should be noted that the key to the *Jungman* case is found in footnote 1 at page 297 where the court notes that district courts have broad discretion of the conduct of trials. It is difficult to accept the proposition that there is a conflict of authority among the jurisdictions on the mere premise that trial judges have chosen to exercise their discretion in varied manners. Furthermore, the *Jungman* case cited by Petitioner merely says that the judge has wide discretion and may choose to ignore the jury determination if he so chooses. The specific language of *Jungman* is that the judge is "entitled to make an independent determination." *Jungman* does not hold that he must make an independent determination.

The trial judge's decision in this regard is supported on another basis. Although the decision of the trial court on the prayer for equitable relief is not technically a trial upon the facts without a jury or with an advisory jury, the spirit of the provisions of Rule 52 would appear to be applicable to the judge's decision, since the trial judge heard the same testimony and evidence submitted to the jury, reviewed the same documents presented and was able to observe the demeanor and candor of the witnesses, etc. In fact, the trial judge had some additional documentary evidence presented to him in regard to the equitable aspects of the case. Because of this, it would seem that the trial judge's findings of fact implicit in his decision should "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". *Sicula Oceanica, Sp. A. v. Willmar Marine Engineering and Sales Corporation,* 413 F. 2d 1332 (5th Cir. 1969); *U. S. v. Pelzer Realty Company, Inc.,* 484 F. 2d 438 (5th Cir. 1973).

2. Certiorari should not be granted to review the opinion of the Court of Appeals on the procedural due process issues, since the Court of Appeals' opinion was in line with controlling precedent from this Court.

Petitioner, in petitioning for certiorari, asks this Court to overrule settled Supreme Court authority on the question of whether a public employee is entitled to a hearing prior to his discharge from employment. The Court squarely addressed this issue in *Arnett v. Kennedy,* 416 U. S. 134 (1974). In that case, the Court, in an opinion by Justice Renquist, and joined by the Chief Justice and Justice Stewart, held that due process was not violated by the dismissal or suspension of a non-probationary federal employee without a pre-termination hearing, so long as a proper hearing was afforded him within a reasonable time.

In brief, Petitioner relies heavily on footnote 4 in the case of *Board of Regents v. Roth,* 408 U. S. 564, 569 (1972) for the proposition that a pre-termination hearing is required before a property interest is terminated. However, the Court should consider two important distinguishing factors about the *Roth* case. First, the holding of the *Roth* case is limited to a finding that the plaintiff did not have a constitutionally protected property interest. Second, subsequent decisions such as *Arnett v. Kennedy, supra,* indicate that the language from *Boddie v. Connecticut,* 401 U. S. 371, 379 (1971) that requires a pre-termination hearing before dismissal is no longer an absolute requirement. Indeed, in *Mathews v. Eldridge,* 424 U. S. 319, 341 (1976), the Court reviewed its decisions on pre-termination hearing and stated that *Goldberg v. Kel-*

ley, 397 U. S. 254 is the only case in which the Court has held that due process absolutely required a hearing prior to the deprivation of a property right. The Court notes that its decision in *Goldberg* is premised on the fact that a temporary denial of benefits in that case would deprive the recipient of life-sustaining resources. 424 U. S. at 339.

In *Mathews,* the Court looked to *Arnett v. Kennedy* in stating that if the dismissed employee had notice of the action sought, a copy of the charge, reasonable time for filing a response and an opportunity at some point for oral appearance, then due process requirements are satisfied. While the Court notes that this may be one method of satisfying due process requirements, there may be others. The Court states:

> "These decisions underscore the truism that due process, unlike some legal rules, is not a technical exception with a fixed content unrelated to time and circumstance."

The *Mathews* Court then cites *Morrisey v. Brewer,* 408 U. S. 471, 481 (1972) for the proposition that due process is flexible and calls for such procedural protections as the situation demands. This flexible standard was enumerated in *Cafeteria and Restaurant Workers v. McElroy,* 367 U. S. 886 (1961) where the Court states:

> "Consideration of what procedures due process may require under any given set of circumstances must begin with the determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action."

It is clear that the determination of what process is due in an employment termination situation involves a

balancing between the state's and the individual's interest. *Arnett v. Kennedy* recognizes that the state has a substantial interest in promoting the efficiency and morale of its employees. The facts of the *Arnett* case are strikingly similar to the case presently before the Court. In the instant case, the state of Alabama had a pressing need to remove Odis Best from his position as a revenue examiner. Investigations ordered by Mr. Eagerton reflected that Best had taken advantage of his position as a state employee for pecuniary gain and to the detriment of other citizens of the state. In addition, Best used his expertise and knowledge of the revenue laws to thwart the Revenue Department's audit of his tax returns. As recognized by Justices Powell and Blackman in their concurring opinion in *Arnett v. Kennedy,* if the government is to perform its duties effectively, the government must have wide discretion and control over its personnel. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony and ultimately impair the efficiency of an office or agency.

Petitioner, in his brief, urges this Court to grant certiorari to review its prior settled authority in light of *Fuentes v. Shevin,* 407 U. S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). Petitioner states:

> "Neither this Court in *Carey v. Piphus, supra,* [435 U. S. 247] nor the panel in *Wilson v. Taylor, supra,* [658 F. 2d 1021] adequately analyzed the principals enunciated in *Fuentes v. Shevin,* 407 U. S. 67, 32 L. Ed. 2d 556, 92 Supt. Ct. 1983 (1972)." [Petitioner's Brief, pp. 45-46]

The fact of the matter is, of course, this Court dealt squarely with the *Fuentes* case, as well as *Goldberg v. Kelley, Bell v. Burson* and *Sniadach v. Family Finance Corporation* in the *Arnett* case. This Court said in *Arnett,*

> "These cases [*Goldberg, Fuentes, Bell,* and *Sniadach*] deal with areas of the law dissimilar to one another and dissimilar to the area of governmental employer-employee relationships with which we deal here. The types of 'liberty' and 'property' protected by the due process clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests."

[416 U. S. at 155.]

This Court in *Arnett,* after holding that a pre-termination hearing was not required before dismissal of a government employee, went on to point out that a post-termination hearing is sufficient even in cases where the employee alleges the deprivation of a Fifth Amendment "liberty" interest by being accused of dishonesty, impropriety, or the like, in the course of his dismissal. In this regard, the *Arnett* court stated:

> "But that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements fo the due process clause."

[416 U. S. at 157.]

The *Arnett* opinion makes it clear that the employee in that case was seeking what Petitioner here seeks by sug-

gesting that this Court reconsider Arnett in light of *Fuentes,* that is, an evidentiary-type hearing prior to dismissal. The *Arnett* Court thoroughly considered and then rejected such an extension of procedural due process in the employer-employee setting. In Justice Powell's concurring opinion in *Arnett,* joined by Justice Blackman, it is stated:

> "In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial.
>
> "Appellee's countervailing interest is the continuation of his public employment pending an evidentiary hearing. Since appellee would be reinstated and awarded backpay if he prevails on the merits of his claim, appellee's actual injury would consist of a temporary interruption of his income during the interim. To be sure, even a temporary interruption of income could constitute a serious loss in many instances. But the possible deprivation is considerably less severe than that involved in *Goldberg,* for example, where termination of welfare benefits to the recipient would have occurred in the face of 'brutal need.' 397 U. S., at 261. 25 L. Ed. 2d 287. Indeed, as the Court stated in that

> case, 'the crucial factor in this context—a factor not present in the case of . . . the discharged government employee . . . —is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits,' Id., at 264, 25 L. Ed. 2d 287 (emphasis added)."

[416 U. S. at 168, 169.] [Footnotes omitted.]

Clearly, the Eleventh Circuit has not overstepped the bounds set out in Supreme Court decisional law in holding that the Department of Revenue did not violate Petitioner's procedural due process rights. Likewise, there is no *material* split among the circuits in this regard and no important question of federal law which has not already been settled by this Court.

3. Petitioner is not entitled to review by certiorari of the denial of attorneys' fees to Petitioner by the district court and Court of Appeals since both courts applied a standard recently approved by this Court.

Petitioner seeks review by certiorari of the Eleventh Circuit Court of Appeals affirmance of the trial court's denial of attorneys' fees pursuant to 42 U. S. C. § 1988. Petitioner's basis for claiming attorneys' fees at all is that he was successful on two procedural due process questions which both the Eleventh Circuit Court of Appeals and the trial court found to be "minimal".

It was not until the fourth amendment to the complaint was filed on August 22, 1980, that any *procedural* due process claims were made, and these only in regard to the dismissal and not the suspension. The fifth amendment to the complaint, filed on December 17, 1980, con-

solidated and restated all of Plaintiff's claims against all of the defendants and, for the first time, alleged procedural due process claims in regard to the suspension, as well as the dismissal. A review of this full, restated complaint, as well as the Pretrial Order, will reflect that the procedural due process claims were a very minimal part of Plaintiff's lawsuit. The Court should keep in mind that, according to Plaintiff's own testimony, his primary goal was to "vindicate" his name and recover money damages and injunctive relief against the original three defendants. Even after Commissioner Eagerton was added as a defendant, plaintiff's primary claims against him were the substantive due process and First Amendment claims and the primary remedies sought were reinstatement to his job and money damages against Commissioner Eagerton. The procedural due process claims were obviously extremely minor in comparison to Plaintiff's allegations that Defendant Eagerton violated his substantive due process and First Amendment rights by threatening to fire him for adding Commissioner Eagerton as a defendant in this lawsuit, by instigating a surveillance of Plaintiff, by arbitrarily and capriciously selecting Plaintiff's income tax returns for audit, by arbitrarily and capriciously treating Plaintiff differently than other taxpayers during the course of the audit and by arbitrarily and capriciously suspending and dismissing Plaintiff.

This Court has recently spoken at great length on the question of attorneys' fees pursuant to 42 U. S. C. § 1988 in the case of *Hensley v. Eckerhart,* — U. S. —, 76 L. Ed. 2d 40. In the *Hensley* case, this Court noted that the various circuit courts of appeal had formulated various stand-

ards to determine whether a party was a "prevailing party" under § 1988. In that opinion, it was stated:

> "A plaintiff must be a 'prevailing party' to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that 'plaintiffs may be considered' 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' *Nadeau v. Helgemoe,* 581 F. 2d 275, 278-279 (CA1 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the District Court to determine what fee is 'reasonable'."

The court in *Hensley* went on to cite in footnote 8 [76 L. Ed. 2d at 50] other (obviously approved) formulations, including *Taylor v. Sterrett,* 640 F. 2d 663, 669 (CA 5 1981). ("The proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought."), the yardstick by which this case was decided.

The approved "central issue" standard was properly applied by both the trial court and the Eleventh Circuit Court of Appeals in this case. Unlike the *Hansley* case, wherein this Court noted that the District Court had found that "the relief [Respondents] obtained at trial was substantial and certainly entitles them to be considered prevailing . . .", both the Eleventh Circuit and the trial court found Petitioner's victories to be minimal. The Eleventh Circuit Court of Appeals stated in its opinion:

> "The procedural due process claims in this case accrued after the suit had been filed, were added by amendment and were resolved by partial summary judgment. The trial lasted over one week and re-

> sulted in jury verdicts in favor of all the defendants. We cannot logically construe the procedural due process claims as the 'central issue' or 'main issue' in a suit which sought reinstatement and one million dollars. We agree with the district court that Best's 'success on his procedural due process claim against defendant Eagerton was a very minimal part of plaintiff's law suit,' 516 F. Supp. at 1066. The district court was correct in its conclusion that Best was not a 'prevailing party' under 24 U. S. C. Section 1988 and was not entitled to attorney's fees."

[696 F. 2d at 1289.]

It is thus clear that both the district court and the Eleventh Circuit Court of Appeals were correct in holding that Petitioner had not crossed the statutory threshold of § 1988 under the Fifth Circuit standard, adopted by the Eleventh Circuit and approved by this Court in *Hensley*. Certiorari is thus inappropriate since the lower court's decision is not in conflict with the most recent decision of this Court on this subject nor, under *Hensley*, does any diversity among the circuits rise to constitutional proportions.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD B. GARRETT
JOHN BRECKENRIDGE
(Counsel of Record)